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Supreme Court of the United States

October Term, 1991

KPMG PEAT MARWICK, CONTROL DATA CORPORATION, NORBERT R. BERG, WILLIAM C. NORRIS, ROBERT M. PRICE, and MARVIN G. ROGERS,
Petitioners,

v.

DIANE ABBEY, DAVID WEISGAL, WILLIAM STEINER, WILLIAM RANDALL, and JOHN PAGE,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. In an action brought under Section 10(b) of the Securities Exchange Act of 1934, was it improper for the Court of Appeals to hold that a jury should be allowed to consider all of the available evidence in determining whether plaintiffs have proven loss causation?

2. In an action brought under Section 10(b), should this Court decide abstract issues relating to rebutting the presumption of reliance on the integrity of the market where the issue was not considered by either the district court or Court of Appeals and where the jury has not yet considered the issue?

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

This case, a consolidated securities class action suit, presents nothing more than the routine factual question of whether plaintiffs adduced sufficient evidence at trial to allow their claims to be heard by a jury. The United States Court of Appeals for the Eighth Circuit ruled that they had. It did not find that plaintiffs had proven their case or any element of it. It did not find that defendants had violated the federal securities laws. In fact, it did not issue any ruling of law whatsoever. All that the Eighth Circuit found was that a jury should be permitted to consider plaintiffs' claims.

Plaintiffs, Diane Abbey, David Weisgal, William Steiner, William Randall and John Page, respondents here, are the certified representatives of a class of shareholders who purchased the common stock of Control Data Corporation ("CDC") during the period January 7, 1985 through and including August 6, 1985 (the "Class Period"). Plaintiffs sued CDC, certain of its directors and/or officers and its outside auditors, KPMG Peat Marwick ("Peat Marwick"), charging that defendants disseminated a series of materially false and misleading statements to the investing public during the Class Period in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

After four years of intensive discovery, trial of this action commenced on January 16, 1990. Plaintiffs presented their case in three weeks, at the conclusion of which all defendants moved for a directed verdict. Although defendants' directed verdict motions were based on a variety of grounds, the district court expressly held that except for the element of causation, "the evidence was sufficient to allow the case to go to the jury" on "all other elements" of a Section 10(b) claim. (Petitioners' Appendix at 14a). The district court ruled, however, that it would not permit the case to be considered by the jury because it believed that the evidence showed that "the improper conduct did not cause the damages, nor were the damages produced by conduct which was classified as improper." (Petitioners' Appendix at 16a).

The judgment of the district court granting a directed verdict was reversed by the Court of Appeals. After careful consideration of the trial record, including a twelve volume set of trial transcripts and an Appendix of nearly 1,500 pages comprised of, *inter alia*, 75 trial exhibits, the Eighth Circuit held that "[t]he class presented evidence of a sufficient 'causal nexus' between CDC's improper [conduct] and the drop in CDC's stock price, so that a reasonable jury could find causation." *In*

re Control Data Corp. Securities Litigation, 933 F.2d 616, 621 (8th Cir. 1991). Accordingly, the Court of Appeals remanded the case to the district court for a plenary trial. Although defendants strain to contrive a basis for this Court to grant certiorari, nothing in the opinion of the Eighth Circuit raises a question any more novel than whether plaintiffs offered sufficient evidence of causation in support of their claims under Rule 10b-5 so that a jury should be allowed to consider them.

The lawsuits which comprise this consolidated class action were brought after CDC, at the insistence of the Securities and Exchange Commission ("SEC"), announced on August 6, 1985 that it was restating its previously reported financial results for its fiscal year ending December 31, 1984. As a result of the restatement, CDC's reported earnings declined by 84 percent, from $31.6 million to $5.1 million, and per share earnings were reduced from $0.81 to $0.12. The restatement of earnings for 1984 resulted from the reversal of two accounting decisions made by CDC, and approved by Peat Marwick, which were seriously challenged by the SEC. The major portion of the restatement was based upon the reversal of a claimed $16.8 million net operating loss ("NOL") carryforward tax benefit arising from CDC's decision to discontinue a certain product line within its computer peripherals business. The restatement was also undertaken as a result of the SEC's belief that $9.7 million in losses sustained by one of CDC's affiliated companies that were charged to retained earnings should have been recognized in CDC's income statement. Plaintiffs alleged that these accounting decisions were made in violation of generally accepted accounting principles ("GAAP") and that Peat Marwick failed to conduct its year-end audit of CDC in accordance with generally accepted auditing standards ("GAAS").[1]

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1. In addition to their allegations of accounting improprieties, plaintiffs, in their Consolidated Complaint filed in December 1985 and in their responses to defendants' contention interrogatories

The investment community did not become aware of the full implications of the August 6, 1985 restatement until five business days later when, on August 13th, *The Wall Street Journal* reported that the restatement had caused CDC to be in default of revolving credit agreements with its lending banks. These revolving credit agreements were a critical source of short-term financing for the Company. The default occurred when the restatement caused CDC to violate the terms of loan covenants in these agreements which required the Company's financial condition to be maintained at certain minimum levels. With this announcement, the price of CDC stock experienced a sharp decline of $3.00 per share in heavy trading.

The nature of plaintiffs' evidence as to the causation element of their Rule 10b-5 claim, which was carefully analyzed by the Court of Appeals, is best understood in the context of the severe financial crisis in which CDC found itself at the time defendants elected to engage in fraudulent accounting manuevers in late 1984 and early 1985. Plaintiffs offered substantial evidence at trial which chronicled the steep decline of CDC's financial condition during 1984. The most profound problems for CDC were occurring in its computer peripherals disk drive business, the Company's largest revenue producer of its four main business segments. As characterized by defendant Robert M. Price, CDC's Chief Operating Officer, the industry was undergoing an "enormous restructuring" which was fundamentally changing the nature of the peripherals disk drive business. In 1984,

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NOTES *(Continued)*

served in December 1988, alleged numerous other independent grounds for charging defendants with violations of Rule 10b-5. For example, plaintiffs alleged that during the Class Period, defendants misled investors about the status of CDC's compliance with its loan covenants, issued projections of financial performance which were without reasonable basis and failed to disclose that serious problems were plaguing the Company's key peripherals business. These matters are not before the Court.

many new foreign competitors entered the market and, within a few short months, CDC was experiencing severe price erosion in a number of its product lines. The pressure on CDC's peripherals business further intensified in the fall of 1984 when a large increase in order cancellations and shipment deferrals by major customers heralded the arrival of a softening market. Finally, CDC itself contributed greatly to these problems because its manufacturing costs were excessively high, the quality of its products was not up to world competitive levels and the Company suffered from a chronic inability to develop and deliver new products into the marketplace in a timely manner.

The confluence of all of these negative trends caused CDC's inventories to skyrocket in 1984. In order to finance its mounting inventories, CDC was forced to incur unprecedented levels of debt. As a condition for committing lines of credit totalling $300 million, the Company's lenders required CDC to agree to abide by the terms of several different loan covenants. Among other things, the loan covenants required CDC's computer business to maintain a minimum net worth of $900 million and a debt to equity ratio of .9 to 1, and limited CDC's right to declare dividends. The banks were entitled to declare the Company in default of its revolving credit agreements upon violation of any one of these covenants.

By the end of 1984, CDC's financial condition had deteriorated so badly that the Company was on the brink of an impending default. As plaintiffs demonstrated at trial, the prospects for default were seriously considered by CDC's senior management and Peat Marwick, but were never disclosed to the Company's shareholders. For example, in early December 1984, CDC reported to Peat Marwick in connection with the year-end audit that "debt covenant restrictions are very close" and that it was "putting programs in place to manage assets and cash flow requirements." Similarly, at a CDC Management Committee meeting held on January 2-5, 1985,

defendant Price, while excoriating his senior management for submitting "irresponsible" 1985 budgets, also expressed his concern that CDC had "serious problems with [its] bank covenants." At the same meeting, CDC's corporate controller "demonstrate[d] the seriousness of the problem" and stated that "[i]f we are to avoid being in default of our bank covenants, we must either increase earnings or reduce our debt." While CDC and Peat Marwick acknowledged internally "the seriousness of the problem," the investing public remained unaware of the true state of the Company's financial condition. Indeed, as recently as November 1984, at a meeting of security analysts, the Company's Chief Financial Officer, defendant Marvin G. Rogers, misled investors by proclaiming that CDC was "stronger financially than it's been during most of its history."

Defendants contrived to maintain this fiction at a meeting which the Company held with its bankers on December 12, 1984. In order to mollify the bankers' concerns, CDC told them that the Company's 1984 earnings would be $0.80 per share and that it expected to earn $4.00 per share in 1985. The Company later disseminated these identical figures to the public in a press release dated January 4, 1985 (the last business day before the beginning of the Class Period). CDC's release of 1984 earnings to the bankers and the public occurred significantly before Peat Marwick had substantially completed its year-end audit of the Company. Nevertheless, since the $0.80 per share figure varied by only one penny from Control Data's actual, unrestated 1984 earnings, there can be no doubt that this figure was the product of the improper NOL tax benefit and retained earnings accounting decisions at issue in this litigation.

Not only did the two accounting adjustments dramatically increase the Company's earnings, but the balance sheet effect of the $16.8 million NOL carryforward tax benefit afforded CDC some much needed

breathing room in complying with its loan covenants.[2] In February 1985, defendant Rogers sent a memorandum to defendant Price which listed "CDC financing/ default avoidance" as his No. 1 priority for 1985. Rogers' concern with "default avoidance" was graphically illustrated by an attachment to this memorandum which showed that as of January 31, 1985, CDC had a net worth of approximately $915 million. If CDC had not availed itself of the $16.8 million NOL tax benefit, the Company's net worth would have been reduced to below the $900 million minimum required by one of its loan covenants. Thus, but for defendants' decision to record the NOL tax benefit, CDC would have been in default of its revolving credit agreements by at least as early as January 31, 1985. Clearly, defendants' fraudulent accounting was designed to conceal the precarious state of CDC's financial condition from the investing public.

As 1985 unfolded, the negative trends which had commenced during the previous year intensified and CDC's financial condition declined even more rapidly. The Company planned a $300 million debt offering for September 1985, the proceeds of which were to have been used to repay its short-term bank debt. However,

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2. CDC's recognition of the NOL tax benefit, and Peat Marwick's certification thereof, was particularly egregious. The applicable generally accepted accounting principles governing NOL carryforward tax benefits are contained in Opinion No. 11 of the Accounting Principles Board of the American Institute of Certified Public Accountants ("APB No. 11"). Under APB No. 11, such a tax benefit may not be recognized unless certain conditions are assured "beyond any reasonable doubt." In its Staff Accounting Bulletin No. 40, the SEC characterized the "beyond any reasonable doubt" standard of APB No. 11 as "one of the most restrictive tests within the authoritative literature." Plaintiffs offered ample evidence at trial that CDC could not possibly satisfy this extremely strict test and the district court found that there was sufficient evidence of GAAP and GAAS violations by defendants. (Petitioners' Appendix at 15a-16a). All of this evidence was also presented to the Court of Appeals, which carefully analyzed it in reaching its factual decision that plaintiffs' case should be allowed to be considered by a jury.

the offering was abruptly cancelled after it was determined that CDC's business had deteriorated even more substantially than described in the offering documents. After the cancellation of the offering, CDC's lenders refused to extend further temporary waivers of default that had been granted when the Company restated its 1984 financial results. In order to stave off possible involuntary bankruptcy proceedings, the Company entered into a protracted period of painful negotiations with its lending banks to restructure the revolving credit agreements. The Company was required to cancel its fourth quarter dividend payment on common stock and it ended 1985 with a staggering loss of more than a half a billion dollars.

Against the backdrop of the grave and undisclosed state of CDC's financial condition that existed in late 1984 and 1985, the "causal link" between defendants' accounting improprieties and the losses of the shareholder class is clear. Defendants' misconduct effectively forestalled disclosure of an impending default for a period of approximately eight months. As the Eighth Circuit correctly observed, "CDC would be liable if its improper accounting concealed the company's net worth and debt-equity ratio and inflated the price of CDC stock by obscuring the company's risk of default on its loan covenants." 933 F.2d at 620. Since plaintiffs' expert opined that precisely this situation had occurred, *see* 933 F.2d at 20 n.8, the Eighth Circuit held that the district court erred in granting a directed verdict for defendants. The Eighth Circuit did not rule that plaintiffs had, in fact, proven causation. Rather, it simply held that "plaintiffs should be allowed to test that claim before a jury." 933 F.2d at 620 n.10. Clearly, the Eighth Circuit decided no issue other than the sufficiency of the evidence offered by plaintiffs at trial.

SUMMARY OF ARGUMENT

There is no need to grant certiorari to decide any of the issues raised by Petitioners. As demonstrated below, the "Questions Presented" by Petitioners simply do not relate to this case or the decision of the Court of Appeals below. Contrary to the issues set forth in the Petition, the Court of Appeals did *not* eliminate loss causation as an element of a Section 10(b) claim, did *not* create a presumption of loss causation and did *not* make any finding as to the circumstances under which the presumption of reliance under the fraud-on-the-market theory may be rebutted. Petitioners' request that this Court immerse itself in the minutia of an immense record, consisting of thousands of pages of trial transcripts, trial exhibits and deposition transcripts, to determine the sufficiency of the evidence should be rejected.

Petitioners' contention that the Eighth Circuit's opinion somehow eliminates "loss causation" as an element of a Rule 10b-5 claim or grants plaintiffs a presumption of causation is simply untrue. The Court made no such ruling and plaintiffs never requested it to do so. The Court of Appeals clearly held that "it is settled" that "causation," among other matters, is an "essential element[] of a Rule 10b-5 claim." 933 F.2d at 618. The Eighth Circuit further held that causation must be demonstrated by "show[ing] some 'causal nexus' between CDC's improper conduct and plaintiffs' losses." 933 F.2d at 619. The Court of Appeals' reversal of the district court was founded upon a straightforward determination that based on the evidence presented at trial, plaintiffs were entitled to have a jury decide whether a causal relationship existed between defendants' accounting improprieties and the losses of the shareholder class. After articulating the standard for proving the causal nexus between defendants' misconduct and plaintiffs' losses, which is the same standard applied by all other courts, the Court analyzed the evidence, including the testimony of plaintiffs' expert,

and concluded that "[t]he class presented evidence of a sufficient 'causal nexus' between CDC's improper accounting and the drop in CDC stock price, so that a reasonable jury could find causation." 933 F.2d at 621. The opinion neither eliminates loss causation as an element of a Rule 10b-5 claim, nor creates a presumption of loss causation. The Eighth Circuit has done nothing more than require that plaintiffs' evidence be weighed by a jury. As such, the opinion does not conflict with any decision of this Court or any other appeals court.

Defendants also contend that review of this case is necessary to obtain additional guidance as to the circumstances under which the presumption of the "reliance" element of a Rule 10b-5 claim accorded a plaintiff under the "fraud-on-the-market" theory, as articulated by this Court in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), may be rebutted. The Eighth Circuit's opinion does not in any way mark a departure from this Court's decision in *Basic*. While Petitioners might be interested in further guidance as to when presumption of reliance may be rebutted, and while the matter is certainly academically interesting, it is clear that neither the district court nor the Eighth Circuit addressed this issue. Since Petitioners concede in their Petition that they did not raise the question of the circumstances under which the presumption of reliance may be rebutted before the Eighth Circuit, review of the issue by this Court is not warranted.

Finally, this case is simply not ripe for consideration by the Supreme Court. All that has occurred is that the Court of Appeals has sent the case back to the district court for trial. Defendants have presented no evidence, a jury has not even considered plaintiffs' claims and, therefore, neither the district court nor the Court of Appeals has ruled on the sufficiency or propriety of any verdict. It would thus be premature for this Court to consider this case.

ARGUMENT WHY THE PETITION SHOULD BE DENIED

I. THE EIGHTH CIRCUIT'S OPINION NEITHER ELIMINATES LOSS CAUSATION AS AN ELEMENT OF A RULE 10b-5 CLAIM NOR CREATES A PRESUMPTION OF LOSS CAUSATION; THE OPINION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER APPEALS COURT

It is hard to understand how Petitioners can contend that the Court of Appeals below has eliminated the element of loss causation or presumed it. It did neither. Citing its earlier decision on the issue of loss causation in *Harris v. Union Electric Co.*, 787 F.2d 355, 366 (8th Cir.), *cert. denied*, 479 U.S. 823 (1986), the Court clearly held that it was "settled" that causation is an "essential element[] of a Rule 10b-5 claim." 933 F.2d at 618. In *Harris*, the Eighth Circuit, just as other circuits before it and since, explicitly discussed both "transaction causation" and "loss causation," finding that a plaintiff must prove each. As the *Harris* court observed:

> Several courts . . . distinguish between "transaction causation" and "loss causation" and require the plaintiff to establish both. Transaction causation is established when the plaintiff shows that the defendant's fraudulent conduct caused the plaintiff to engage in the transaction in question. This is nothing more than "but for" causation, which is merely another way of describing reliance. *Loss causation, on the other hand, is the nexus between the defendant's fraudulent conduct and the plaintiff's pecuniary loss.* (citations omitted) (emphasis added).

787 F.2d at 366. After reviewing the evidence of transaction causation, the *Harris* court stated that "[i]n addition . . ., the plaintiffs were also required to prove loss causation." *Id.* at 367. The court then went on to

engage in a detailed evidentiary analysis of loss causation and damages, *Id.* at 367-68, and affirmed the jury's verdict for plaintiffs on their Section 10(b) claim.[3] *See also, Arthur Young & Co. v. Reves*, 937 F.2d 1310, 1327-1328 (8th Cir. 1991).

Courts have distinguished between transaction causation and loss causation in recognition of the fact that a defendant should not be held liable for that portion of a security's decline in value which is unrelated to the disclosure of the defendant's misrepresentations. *See, e.g., Huddleston v. Herman & MacLean*, 640 F.2d 534, 549 (5th Cir. 1981), *aff'd in part, rev'd in part*, 459 U.S. 375 (1983) ("If the investment decision is induced by misstatements or omissions that are material and that were relied on by the claimant, but are not the proximate reason for his pecuniary loss, recovery under the Rule is not permitted."); *In re Washington Public Power Supply System Securities Litigation*, 650 F.Supp. 1346, 1353 (W.D. Wash. 1986). Thus, a plaintiff must prove that the decision to purchase was induced by a defendant's misrepresentations *and* that those misrepresentations are causally related to the plaintiff's losses. This is exactly what the Eighth Circuit required plaintiffs herein to prove.

Defendants never challenged before the Court of Appeals the fact that plaintiffs had demonstrated "transaction causation" or "reliance" by invoking the fraud-on-the-market theory. As Petitioners themselves admit at page 11 of their Petition, "that [issue] was not contested on appeal." Under the fraud-on-the-market theory, this Court has held that "the reliance of individual plaintiffs on the integrity of the market price [of a given stock] may be presumed" where "materially misleading statements have been disseminated into an impersonal, well

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3. Petitioners' distortion of the *Harris* case in an effort to manufacture a conflict between the Eighth Circuit and other circuit courts is incomprehensible. Their citation of the decision in *Harris* for the proposition that "[t]he Eighth Circuit has, with respect to the [*Affiliated*] *Ute* presumption as well as that of *Basic*, apparently concluded that the presumption of reliance eliminates the need for actual proof of loss causation," Petitioners' Brief at 12 n.10, is belied by the facts and even a cursory reading of *Harris*.

developed market for [the] securities." *Basic, Inc. v. Levinson, supra*, 485 U.S. at 247. The Eighth Circuit in its opinion recognized that transaction causation:

> lies in the fact that the plaintiff relied on the market price of the security as an indicator of the future value of the stock. To the extent that the defendant's misrepresentations artificially altered the price of the stock and defrauded the market, causation is presumed. *See, Basic, Inc. v. Levinson*, 485 U.S. 224, 247 (1988) ("Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for the purposes of a Rule 10b-5 action.").

933 F.2d at 620. This conclusion is based directly on this Court's holding in *Basic*, and is in accord with the decisions of all circuits. *See, e.g., Peil v. Speiser*, 806 F.2d 1154, 1161 (3d Cir. 1986); *Harris v. Union Electric Co., supra*, 787 F.2d at 367, and n.9; *Ross v. A.H. Robins Co.*, 607 F.2d 545, 553 (2d Cir. 1979), *cert. denied*, 446 U.S. 946 (1980); *Blackie v. Barrack*, 524 F.2d 891, 905-908 (9th Cir. 1985), *cert. denied*, 429 U.S. 816 (1976).

However, the reference by the Court of Appeals to reliance or transaction causation had no bearing on its decision to reverse the granting of the directed verdict. For the Court then went on to consider whether plaintiffs had met the standard for proving loss causation — whether there was "some causal nexus between CDC's improper conduct and plaintiffs' losses." 933 F.2d at 619. This inquiry not only does not conflict with any other circuit's inquiry, but is the same standard considered by the other circuits in determining loss causation.[4]

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4. Petitioners themselves admit this when they state at page 11 of their Petition as follows:

> Loss causation, on the other hand, establishes "that the misrepresentations or omissions caused the economic harm." *Schlick v. Penn-Dixie Cement Corp., supra*, 507 F.2d at 380.

The Court of Appeals analyzed the question of whether plaintiffs offered evidence of the required "causal nexus" between defendants' alleged improper conduct and the losses suffered by the shareholder class as follows:

> A jury could reasonably find that CDC's improper accounting artificially altered the price of CDC stock in a variety of ways. Perhaps most obviously the improper accounting inflated 1984 actual earnings and 1985 projected earnings, figures that investors may have considered important in making investment decisions. However, the improper accounting also altered CDC's true net worth and debt-equity ratio. Plaintiffs' expert testified that these figures are financial indicators that would be important to investors because of what they reveal about the status of CDC's loan covenants.

933 F.2d at 620 (footnotes omitted). Thus, the Court of Appeals reviewed two possible factual bases for loss causation and examined whether any evidence presented at trial supported them. Included among the evidence before the Eighth Circuit was the undisputed fact that the price of CDC stock fell by $3.00 when it was disclosed that the restatement had caused the Company to be in default of its loan covenants, and the testimony

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NOTES *(Continued)*

See also Bastian v. Petren Resources Corp., supra, 892 F.2d at 685; *Currie v. Cayman Resources Corp., supra,* 835 F.2d at 785. In the words of the Fifth Circuit, " 'loss causation' refers to a direct causal link between the misstatement and the claimant's economic loss." *Huddleston v. Herman & MacLean, supra,* 640 F.2d 534, 549 n.24 (5th Cir. 1983), *aff'd in part and rev'd* in part on other grounds, 459 U.S. 375 (1983).

The standards set forth by the other circuits are the same as applied by the Eighth Circuit here. Compare, for example, *Huddleston's* requirement of a "causal link between the misstatement and the claimant's economic loss" with the requirement of the court below that plaintiffs demonstrate a "causal nexus between CDC's improper conduct and plaintiffs' losses."

of plaintiffs' expert that this decline in stock value was the result of the revelation of material information regarding CDC's financial condition which defendants' accounting decisions had concealed. The Eighth Circuit determined that this evidence was sufficient to support the theory that defendants' accounting improprieties caused losses to the shareholder class by concealing the status of CDC's compliance with its loan covenants.

Far from ignoring or presuming "loss causation", the Court of Appeals concluded that "[t]he class presented evidence of a sufficient 'causal nexus' between CDC's improper accounting and the drop in CDC stock price, so that a reasonable jury could find causation." 933 F.2d at 621. The Court therefore remanded the case for a new trial, noting that the "[d]etermination of whether a misrepresentation would have the effect of defrauding the market and inflating the stock price is a jury question." *Id.* Clearly then, the Eighth Circuit did not hold that loss causation may be presumed. Nor did it eliminate loss causation as an element of a Rule 10b-5 claim. Nor, in fact, did it announce any principle of law whatsoever. The Eighth Circuit's opinion unquestionably requires plaintiffs to present actual evidence of loss causation and, in this case, it found that the evidence was sufficient to entitle plaintiffs to have a jury hear their claims.

Defendants' attempt to have this Court believe that there is a conflict among the circuits on the necessity of proving loss causation must fail. No appeals court has held that loss causation need not be proven. In *Bastian v. Petren Resources Corp.*, 892 F.2d 680 (7th Cir.), *cert. denied*, 110 S.Ct. 2590 (1990), a case upon which Petitioners' rely heavily, the Seventh Circuit discussed the loss causation requirement and cited numerous cases on the issue. None of the circuit court cases referred to by the Seventh Circuit or those cited by Petitioners eliminate the need to prove loss causation or state that it can be presumed. All of the relevant circuit decisions, including *Bastian* and the decision below,

require proof of loss causation. *See e.g., Bruschi v. Brown,* 876 F.2d 1526, 1531 (11th Cir. 1989) (loss causation requirement "satisfied when a defendant makes representations that are inherently related to the losses the purchaser subsequently suffers."); *Bennett v. United States Trust Co.,* 770 F.2d 308, 314 (2d Cir. 1985), *cert. denied,* 474 U.S. 1058 (1986) (requiring "direct or proximate relationship between the loss and the misrepresentation."); *Huddleston v. Herman & MacLean, supra,* 640 F.2d at 549 (misrepresentation must touch "upon the reasons for the investment's decline in value.") *Marbury Management, Inc. v. Kohn,* 629 F.2d 705, 708 (2d Cir. 1980), *cert. denied,* 449 U.S. 1011 (1980) ("the damage complained of [must] be one of the foreseeable consequences of the misrepresentation."). Defendants have failed to demonstrate the existence of any conflict as to whether loss causation is an element of a Rule 10b-5 claim.

II. THIS CASE PRESENTS NO OCCASION FOR THIS COURT TO DETERMINE THE CIRCUMSTANCES UNDER WHICH THE PRESUMPTION OF RELIANCE ON THE INTEGRITY OF THE MARKET MAY BE REBUTTED

In a last ditch attempt to concoct a basis to obtain review of this case, defendants also assert that this Court should exercise its supervisory power to clarify the circumstances under which the fraud-on-the-market theory's presumption of reliance may be rebutted. This argument was not raised in the court below by defendants, was not briefed below by any party, was not addressed by either the district court or the Court of Appeals and played no part in the decision of either the district court or Court of Appeals. This is admitted by defendants in their Petition at page 11 ("fraud on the market, a concept of reliance that was not contested on appeal . . ."). As such, review of the question by this Court would be inappropriate. *See, e.g. Price Waterhouse v. Hopkins,* 490 U.S. 228, 240 n.5 (1989); *G.D. Searle &*

Co. v. Cohn, 455 U.S. 404, 412 n.7 (1982); *Delta Airlines v. August,* 450 U.S. 346, 362 (1981).

Moreover, Petitioners' argument reflects their continued misunderstanding of the Court of Appeals decision. Contrary to the question presented by Petitioners, the Court did not state that the market price of CDC stock was unaffected by disclosure of the alleged unlawful acts of defendants. It recognized that evidence had been presented of exactly the opposite. In any event, the Court did not hold that defendants are precluded from attempting to rebut the fraud-on-the-market reliance presumption. All that it held was that plaintiffs should be allowed to have their case heard by a jury. At the trial, defendants can put forward whatever competent and relevant evidence they have as to reliance. Review of the circumstances under which the presumption of reliance on the integrity of the market may be rebutted is simply inappropriate at this juncture.

III. NEITHER OF THE ISSUES RAISED BY PETITIONERS ARE RIPE FOR REVIEW

Review of the issues raised by Petitioners is unwarranted because the factual record in this case is not sufficiently developed. The Court of Appeals has made no finding or determination of law or fact which it has applied to Petitioners. All it has done is to hold that the district court erred in granting a directed verdict to defendants and that, under the particular facts adduced at trial, a jury should be allowed to consider plaintiffs' claim that defendants' improprieties caused losses to the shareholder class, as well as any evidence which defendants may offer in defense of these claims. While Petitioners seek clarification as to the circumstances under which the presumption of reliance may be rebutted, they have yet to offer any evidence of their own on this question. Similarly, while Petitioners attack the Eighth Circuit's ruling that plaintiffs have presented evidence as to loss causation, they have yet to offer any

evidence of their own disputing it. Only after a jury has considered the evidence presented by all parties and after both the district court and Court of Appeals have considered the sufficiency or propriety of a verdict by the jury, will this case, if ever, be ripe for consideration by this Court. Clearly, this case is not ripe for review until all issues have been litigated at trial and argued on appeal.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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